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Paper No. 16
RFC

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Thomson Consumer Electronics, Inc.

Serial No. 75/523,702

Scott J. Stevens of Woodward, Emhardt, Naughton, Moriarity
& McNett for Thomson Consumer Electronics, Inc.

Irene Williams, Trademark Examining Attorney, Law Office
112 (Janice O'Lear, Managing Attorney).

Before Cissel, Hohein and Drost, Administrative Trademark
Judges.

Opinion by Cissel, Administrative Trademark Judge:

On July 23, 1998, applicant filed the above-referenced application to register the mark "HORIZONS" on the Principal Register for "flat-screen televisions." The application was based on applicant's assertion that it possessed a bona fide intention to use the mark in commerce in connection with these goods.

The Examining Attorney¹ refused registration under Section 2(d) of the Lanham Act, 15 U.S.C. Section 1052(d), on the ground that applicant's mark, if used in connection with flat-screen televisions, would so resemble a registered mark that confusion would be likely. In addition, the Examining Attorney enclosed information regarding a pending application which, he noted, represented a potential basis for refusing registration under the same section of the Act. That application did mature into Registration No. 2,280,992, which issued on the Principal Register on September 28, 1999 to Horizon Satellite Systems, Inc. for the mark "HORIZON" for "satellite antenna," in Class 9. Then the Examining Attorney withdrew the original citation and cited the new registration as a bar under Section 2(d).

Attached to the second Office Action in support of the refusal to register were copies of excerpts from published articles and copies of third-party registrations which show that satellite antennas and televisions are closely related products and that other businesses have registered their own trademarks for both.

¹ The original Examining Attorney was Thomas Wellington. When he accepted a position as a staff attorney with the Trademark Trial & Appeal Board, Ms. Williams took over the examination of this application.

Applicant responded to the refusal to register with argument that confusion would not be likely with the cited registered mark in view of differences between the goods and the sophistication of the purchasers of them.

The Examining Attorney was not persuaded by applicant's arguments, and in the next Office Action made the refusal to register final. Included with that action in support of the refusal to register were copies of more third-party registrations wherein the lists of goods include both satellite antennas and television sets or the list of services includes retail services featuring both televisions and satellite antennas.

Applicant requested reconsideration, arguing that its mark, "HORIZONS," "creates an entirely different commercial impression" in connection with flat-screen televisions from the commercial impression created by the registered mark, "HORIZON," in connection with satellite antennas.

Applicant contended that because a satellite is positioned and adjusted relative to the horizon, the mark "HORIZON" connotes a functional aspect of the goods, whereas applicant's mark, "HORIZONS," in connection with flat-screen televisions, "suggests a tie to the imagination, 'the range of one's interest.'" Additionally, applicant

argued that the technical sophistication of purchasers of these products makes confusion unlikely because a consumer "... who has learned to discern between similarly (sic) sounding trademarks for computer-related products ... will surely discern between the trademarks in equally sophisticated technologies such as expensive television receivers."

Filed concurrently with the request for reconsideration was applicant's Notice of Appeal. The Board instituted the appeal, but suspended action on it and remanded the application to the Examining Attorney for reconsideration. Upon reconsideration, the Examining Attorney maintained the refusal to register.

Applicant timely filed an appeal brief,² and the Examining Attorney filed her brief on appeal,³ but applicant

² Attached to applicant's brief were copies of pages from the web site of the owner of the cited registration and copies from a search of a private database of trademark registration information. Trademark Rule 2.142(d) provides that the record on appeal is closed with the filing of the Notice of Appeal. Applicant did not follow the procedure outlined in the rule to allow additional evidence to be submitted, so applicant's submission of this evidence with its appeal brief was untimely and the evidence has not been considered.

³ Similarly, the additional evidence submitted by the Examining Attorney with her brief has not been considered for the same reason that we have not considered the evidence submitted with the brief of applicant. We have, however, considered the dictionary definitions attached to the Examining Attorney's brief because we can take judicial notice of them, and to the extent that the evidence submitted with the brief had already been made of record before the appeal, such evidence was also considered.

did not request an oral hearing before the Board.

In *In re E. I. DuPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973), the predecessor to our primary reviewing Court listed the principal factors to be considered in determining whether confusion is likely. Chief among these factors are the similarity of the marks as to appearance, sound, meaning and commercial impression, and the similarity of the goods.

In the case at hand, and we hold that confusion would be likely if applicant were to use the mark it seeks to register in connection with the goods specified in the application because applicant's mark is almost identical to the registered mark and the goods with which applicant intends to use its mark are closely related to the goods set forth in the cited registration.

As noted above, the registered mark is "HORIZON" and applicant's mark is "HORIZONS." Applicant's contention that these two marks have different connotations is not persuasive. Applicant's mark is simply the plural version of the registered mark. As noted by the Examining Attorney, the test of likelihood of confusion is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks create the same overall commercial impression. Visual

Information Institute, Inc. v. Vicon Industries Inc., 209 USPQ 179 (TTAB 1980). We must take into consideration the recollection of the average purchaser, who normally retains a general, rather than specific, impression of trademarks. Chemtron Corp. v. Morris Coupling & Clamp Co., 203 USPQ 537 (TTAB 1979). The commercial impressions these marks are likely to leave on prospective purchasers of the goods in issue in this case are very similar.

Moreover, the Examining Attorney has demonstrated that flat-screen televisions, which are the goods identified in the application, are closely related to satellite antennas, the goods set forth in the cited registration. The dictionary definitions and the excerpts from the published articles made of record by the Examining Attorney plainly show that satellite antennas are used to receive the signals which television receivers convert into the images presented on their screens. Additionally, the third-party registrations of record listing both types of goods demonstrate that other businesses have registered their own trademarks for both satellite antennas and television sets. This provides a reasonable basis upon which to conclude that purchasers would understand the use of the same or similar trademarks in connection with both of these products is an indication that they emanate from common

source. In re Albert Trostel & Sons, Co., 29 USPQ2d 1783 (YYAB 1993).

Applicant argues that its goods will move through different channels of trade from the ones in which the goods set forth in the registration move. This argument, however, is based on the evidence untimely submitted with applicant's appeal brief, so it is essentially unsupported. In any event, it is well settled that the issue of likelihood of confusion must be determined on the basis of the goods as they are identified in the application and registration, respectively, without limitations or restrictions not reflected therein. Canadian Imperial Bank of Commerce v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987); In re Elbaum, 211 USPQ 639 (TTAB 1981). The satellite antennas identified in the registration therefore must be interpreted to encompass the kinds of satellite antennas employed by ordinary consumers for use in connection with their flat-screen televisions. There is no basis upon which we can conclude that the customers for either type of product are so sophisticated that they would not be likely to be confused by the use of such similar marks in connection with these related products.

In any event, even if we were left with doubts as to whether confusion would be likely, any such doubt would necessarily be resolved in favor of the registrant and against the applicant, who has a duty to select a mark which is not likely to cause confusion with the mark already in use by the registrant. *Burroughs Wellcome Co. v. Warner-Lambert Co.*, 203 USPQ 191 (TTAB 1979).

DECISION: The refusal to register under Section 2(d) the Lanham Act is affirmed.